(10)

No. 96-1291

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DOLORES M. OUBRE,

Petitioner,

v.

ENTERGY OPERATIONS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE ILLINOIS STATE CHAMBER OF COMMERCE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether, under the Older Workers Benefit Protection Act, an employee ratifies a release of claims under the Age Discrimination in Employment Act which does not satisfy the technical requirements of the OWBPA by retaining sums paid for the release.

LIST OF PARTIES

1. Petitioner is Dolores M. Oubre

2. Respondent is Entergy Operations, Inc.

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OPINION BELOW

The November 6, 1996 decision of the United States Court of Appeals for the Fifth Circuit is reported at 112 F.3d 787. The May 28, 1996 opinion of the United States District Court for the Eastern District of Louisiana is not reported.

JURISDICTION

The Fifth Circuit Court of Appeals rendered its decision on November 6, 1996. The Petition for Writ of Certiorari was filed February 4, 1997 and granted April 21, 1997. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(b).

STATUTE INVOLVED

This case involves Section 201 of the Older Workers Benefit Protection Act ("OWBPA"), Pub. L. 101-433, Title II, 201, 104 Stat. 983 (1990), incorporated at 29 U.S.C. § 626(f).

INTEREST OF *AMICUS CURIAE*

The Illinois State Chamber of Commerce ("Illinois Chamber") is a voluntary membership organization of over 4,000 Illinois employers with over one million employees, local chambers of commerce and a variety of trade and professional organizations.[1] Over one-third of

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[1] The Illinois Chamber's brief has not been approved or financed by respondent, its counsel or any other party. Pursuant to Supreme Court Rule 37.3(a), the Illinois Chamber presents herewith its consent letters from the parties.

the Illinois Chamber's members are smaller employers with 100 or fewer employees. The Illinois Chamber is committed to the success of the business community in Illinois—a business community providing millions of satisfying jobs throughout the state. An overwhelming majority of the Illinois Chamber's employer members will be affected by the Court's decision in this case. The Illinois Chamber has filed briefs *amicus curiae* in various state and federal courts including the United States Supreme Court. In this Court, the Illinois Chamber has participated *amicus curiae* in the case of *Walters v. Metropolitan Education Enterprises, Inc.*, 117 S.Ct. 660 (1997).

SUMMARY OF ARGUMENT

The Fifth Circuit properly concluded that a release which does not meet the technical requirements of the OWBPA cannot, on its own, preclude an employee from asserting an ADEA claim. However, the Fifth Circuit also correctly concluded that if the employee has been given a severance package in exchange for the release, the employee must choose between keeping the severance benefits and, thereby, ratifying the release, and returning the benefits and pursuing an age discrimination claim. This practical decision should be affirmed because the OWBPA does not displace the common law doctrine of ratification. The OWBPA simply enumerates the criteria necessary for a waiver of ADEA claims to be effective as written. Ratification is consistent with the ADEA's express goal of promoting private agreements between employers and older workers.

Moreover, the well-established concepts of ratification and tender back actually promote private agreements and protect employers that are imperiled by the OWBPA's vagueness when applied to real world business decisions. These concepts also protect employers from litigious employees who can easily create fact issues concerning the circumstances surrounding execution of a release. Lastly, they protect employees by allowing them the choice between keeping a benefit package they would not have received absent the release or pursuing ADEA claims.

Rejection of the ratification or tender back doctrines in the ADEA context, especially when based upon a faulty comparison to the Federal Employer's Liability Act, is likely to have a chilling effect on employers' desires to offer enhanced benefits to employees who, for various business reasons, must be let go. In reality, this will hurt the numerous employees who have no interest in litigation and would prefer to obtain extra severance benefits for themselves and their families.

STATEMENT OF THE CASE

The Illinois Chamber adopts the respondent's Statement of the Case.

ARGUMENT

The central issue in this case is whether an employee, by accepting and retaining severance benefits provided by an employer in exchange for a release of claims, ratifies an otherwise unenforceable waiver of age discrimination claims. The resolution of this issue can be

expected to affect thousands of employment decisions, as businesses restructure, downsize, or consolidate in response to changing economic conditions. Ratification is a fundamental contract law principle which was known to the Congress, but not addressed, when it enacted the OWBPA. The tender back issue concerns whether equity should require the employee to return the severance benefits before proceeding with an ADEA action.

If the decision below is overturned, it will inevitably increase the flood of ADEA litigation presently occupying the district courts. Moreover, it will discourage employers from offering severance benefits to employees in exchange for releases. The Illinois Chamber's members have raised this concern, and the Illinois Chamber believes such results already are occurring. To the extent employers do offer such severance benefits, reversal will encourage terminated employees to accept the benefits and then to pursue the very type of litigation the employer paid to avoid. Indeed, litigation stands to be financed by the severance payments intended to prevent such future disputes, contrary to the preference of Congress for settlement of employment discrimination claims.

The petitioner's position disregards the extreme difficulties employers can encounter when attempting to comply with the OWBPA waiver provisions; the ease with which former employees seeking to escape a waiver can create a fact issue concerning the waiver's validity; and the manner in which the OWBPA can be abused. She does so by suggesting that the OWBPA completely displaced common law contract principles when no such intent is expressed in the statute.

I. PETITIONER MISREADS THE OWBPA.

Petitioner asserts that older employees who execute faulty severance agreements in exchange for severance benefits should be able to both sue their former employers for age discrimination and keep the severance benefits designed to foreclose such litigation. In an effort to persuade the Court that such individuals should not be required to tender back the enhanced severance benefit, petitioner reads provisions into the OWBPA concerning ratification which do not exist. In essence, petitioner claims the OWBPA displaces the common law principle that a voidable contract may be ratified. While Congress was plainly aware of the long-standing legal doctrine of ratification (*See Blistein v. St. John's College*, 74 F.3d 1459, 1466 (4th Cir. 1996); RESTATEMENT (SECOND) OF CONTRACTS § 85 (1981)), it did not address the issue in the statute, nor did it discuss whether an employee seeking to disclaim a waiver may do so without tendering back the consideration she received for the waiver. This is not surprising as the OWBPA's purpose appears to be more limited. The statute simply sets forth the requirements that must be met for a waiver to be enforceable as written. If those requirements are not satisfied, the employer will not be able to enforce the written waiver.

This being said, the OWBPA's language should not be construed to mean that an employee is precluded from waiving his claims no matter how much he may wish to do so. As the Fifth Circuit has noted, such a result would contravene OWBPA's purpose.

> We do not interpret the language of section 626(f)(1) to mean that a waiver which fails to meet the requirements of subsections (A) through (H) is void of

> legal effect. Rather, we interpret it to mean that such waivers are not knowing and voluntary and thus are subject to being avoided at the election of the employee. This interpretation comports with the language of section 626(f)(1) and is supported by the legislative history of the OWBPA.

Wamsley v. Champlin Refining & Chemicals, Inc., 11 F.3d 534, 539 (5th Cir. 1993). For these reasons, the Fifth Circuit held that "neither the language nor the purpose of the OWBPA indicates a congressional desire to deprive an employee of the ability to ratify a waiver that fails to meet the requirements of the OWBPA." *Id.* at 539-540. Petitioner's contrary conclusion is not supported by the statutory text on which she relies.

In rejecting the concept that a release which does not satisfy the OWBPA's requirements can be ratified, the Sixth Circuit recently criticized the Fourth and Fifth Circuits on the basis that, "[t]he OWBPA unambiguously states at Section 626(f)(1) that an individual 'may not waive' ADEA claims unless the OWBPA requirements are met. There is no hint of any exception." *Howlett v. Holiday Inns, Inc.*, No. 95-6236, 1997 U.S. App. Lexis 20504, at *7 (6th Cir. Aug. 5, 1997). The Sixth Circuit, however, does not address the language of Section 626(f)(1)(G). As the Fifth Circuit noted in *Wamsley*,

> Section 626(f)(1)(G) expressly provides that for seven days after execution of a waiver agreement an employee may revoke the agreement and that the agreement does not become enforceable until the expiration of the seven day revocation period. If non-compliance with the other subparts of section 626(f)(1) rendered the agreement void, there would be no need for subpart (G).

11 F. 3d at 539. Thus, a prohibition of ratification cannot be read into the OWBPA.

II. COMPLYING WITH THE REQUIREMENTS OF THE OWBPA IS FAR FROM A SIMPLISTIC PROCESS.

Contrary to petitioner's argument and the reasoning of the Sixth Circuit in *Howlett v. Holiday Inns, Inc.*, No. 95-6236, 1997 U.S. App. Lexis 20504, at *12-13 (6th Cir. Aug. 5, 1997), compliance with the OWBPA just is not as simple as it may seem. Consider, for example, the requirement in 29 U.S.C. § 626(f)(1)(H) that, "if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees," the employer must provide information as to:

> (i) any class, unit or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and
>
> (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

Unfortunately for employers, the OWBPA does not define "same job classification or organizational unit" and the phrase is fraught with the potential for dispute. Likewise, the OWBPA contains no insight as to the meaning of the phrase "exit incentive or other employee termination program," and it does not define what is meant by "a group or class of employees." The statute neither prescribes the time frame the employer must

consider in determining whether the termination of several employees during a period of weeks or months involves "a group or class of employees," nor does it illuminate whether multiple sites or facilities must be aggregated for the same purpose. In fact, the statute offers precious little guidance for employers, which must attempt to ascertain when the 45 day notice period of Section 626(f)(1)(F)(ii) and the special information requirements of Section 626(f)(1)(H) are triggered.

These statutory vagaries present tremendous problems for employers. Because of these potential pitfalls, the Illinois Chamber's larger employer members face a host of challenges when attempting to comply with the OWBPA. Consider a national company that cuts its number of operating divisions in half and consolidates into fewer divisions. As a result of this restructuring, numerous sales and engineering personnel are terminated, along with production personnel, while some sales and engineering personnel are retained. Sales offices are consolidated with research and development departments from a variety of sites and from various former divisions. This reduction and consolidation program is implemented over a period of eighteen months. If older employees from unit A are being offered severance packages in exchange for releases of ADEA claims, is the employer obligated to make rolling disclosures about eligible employees in units B and C because personnel from all three units are later consolidated into unit D? If so, which persons and what job classifications are relevant, and will this differ depending on whether the person displaced is in production, sales or engineering?

Consider a company with multiple facilities which determines that a reduction in force will be implemented

entirely from one of its sites. While the OWBPA speaks in terms of providing information from the employing unit—which has generally been interpreted to mean the facility at which the affected employees worked—one court has recently held that the disclosures should have contained information on employees at the other sites. *See, Griffin v. Kraft General Foods, Inc.*, 62 F.3d 368, 372 (11th Cir. 1995). If an employer provides the required information, based on its view of the relevant job classification or organizational unit, and a former employee later contends that a different classification or unit should have been used, any waiver obtained by the employer will be imperiled. If the employee's view of the relevant classification or unit ultimately prevails, any payment made for the waiver would be, under the petitioner's reasoning, nothing more than lost money. Should a good faith effort to comply with OWBPA's disclosure requirements result in releases simply being deemed void because the employer could not intuit the intent of Congress?

Finally, consider a smaller, unsophisticated employer that is forced to let two employees go because of business conditions. Suppose that employer offers a severance package to the employees with less than 45 days to consider it in order to help ensure that the employees can pay their bills. While not in strict compliance with the OWBPA, should such agreements simply be declared void, thereby forcing these employers to fund litigation against themselves? These are real issues confronting unsuspecting employers in the business world and are far from the picture of deliberate deception on the part of employers painted by petitioner and her *amici*.

Considerations such as these helped to persuade the Fifth Circuit in *Wamsley v. Champlin Refining & Chemicals, Inc.*, 11 F.3d 534 (5th Cir. 1993), and the Court below to endorse the principle that a waiver is voidable, not void, under the OWBPA and can be ratified by retaining the benefits received in consideration for the waiver even after learning that one or more of the requirements in Section 626(f) were not satisfied. As *Wamsley* emphasized, "one of the expressed purposes of the ADEA [was] 'to help employers and workers find ways of meeting problems arising from the impact of age on employment.' 29 U.S.C. § 621(b)." 11 F.3d at 539. Thus, the statute expressly encourages settlement and compromise rather than litigation. Specifically, as the Fifth Circuit explained in *Wamsley*,

> [t]he simplest and easiest way to further this purpose is to give effect to private agreements which resolve age related employment problems without the inevitable delays and costs associated with litigation. Were employers forced to assume the risk that noncompliance with all [the] statutory requirements of Section 626(f)(1) renders a waiver agreement for which they have paid valuable consideration void and thus, not capable of being ratified, clearly, they would be disinclined to propose such solutions.

Id.[2] As noted in *Wamsley*, overturning the Court of Appeals ruling in this case will frustrate the goal of compromise; will dissuade employers from offering severance packages to many older workers who are pleased to receive them; and, likely will generate further litigation under the ADEA.

[2] *Wamsley* rejected the Seventh Circuit's reasoning in *Oberg v. Allied Van Lines*, 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 511 U.S. 1108 (1994) which held that waivers which do not satisfy the OWBPA are void. The Seventh Circuit has subsequently questioned the logic of its own decision. *See*, *Fleming v. United States Postal Service AMF O'Hare*, 27 F.3d 259, 261 (7th Cir. 1994), *cert. denied*, 513 U.S. 1085 (1995). ("The idea behind these cases [finding releases void] . . . is a little obscure to us.")

III. WITHOUT THE PROSPECT OF RATIFICATION, EMPLOYEES CAN EASILY AVOID THE OWBPA.

Wamsley also illustrates the ease with which a former employee seeking to escape a waiver can create an issue of fact about the waiver's validity under the OWBPA. The notice pertaining to release of claims in *Wamsley* expressly informed the affected employees that they could take up to 45 days to consider the proposed release. 11 F.3d at 536. Nonetheless, the former employees who executed the release later sued under the ADEA, alleging that the release was invalid because the employees were not given 45 days to consider it, as required under 29 U.S.C. § 626(f)(1)(F)(ii). The employer moved to dismiss based on the release, and it also submitted affidavits "specifically denying that [the employees] were told to execute and return the releases prior to the expiration of the 45-day period." *Id.* at 537. The employees responded with affidavits of their own, claiming that they were told orally by certain employer representatives that, to receive benefits under the Termination Pay Plan, they had to execute the release no later than their termination date, which was less than 45-days after they received the notice. Thus, the Fifth Circuit held that the plaintiffs' evidence was sufficient to create an issue of fact precluding summary judgment as to the validity of the waivers under the OWBPA. *Id.* at 538. As

the Court later observed in explaining its further holding that the waivers were not void but voidable, and hence subject to ratification,

> the nature of [the employees'] attack on the agreements assured [the employees] of a fact issue with which to avoid summary judgment on [the issue of the validity of the waivers]. Thus, were we to conclude that [the employees'] waiver agreements were void from their execution, [the employer] would be facing continued litigation with opponents who could use, and possibly have used, to finance their suit, the very funds [the employer] paid as consideration to avoid litigation.

Id. at 539, n. 9. Thus, even an agreement which, on its face, meets all of the OWBPA requirements can be attacked without consequence to the employee if offending agreements are considered void rather than voidable.

Petitioner and her *amici* argue that, in the event she were to prevail in her ADEA action, the severance payments made by Entergy could be deducted from any award determined to be due her. This argument, however, fails to address what will happen if ratification is not enforced and Entergy later prevails on the merits. In that event, there will be no damage award against which to offset the additional severance payments. Entergy will have been found not liable for any discrimination, Entergy will have borne the considerable cost and expense of litigation and Entergy will have been denied any recovery of the severance payments made to petitioner. In the name of advancing the policies of the OWBPA, a company that does not discriminate on the basis of age will be treated more harshly than one that does. Congress could not have intended this bizarre result.

IV. IF THE UNDERLYING DECISION IS OVERTURNED, THE POTENTIAL FOR ABUSE IS GREAT.

As the Fourth Circuit remarked in *Blistein v. St. John's College*, 74 F.3d 1459, 1462 (4th Cir. 1996), "an unfortunate, although foreseeable, pattern" of age discrimination litigation has developed wherein employees negotiate handsome severance packages, wait until they collect every benefit available to them under their agreements and then turn around and sue their employers for age discrimination.

Consider the scenario in *Blistein*. There the employee was informed that his position was being eliminated. He then negotiated a severance package including health benefits, tuition assistance for his children, approximately $15,000 cash, medical benefits for his dependent children and art studio space in exchange for a release of all claims. When the state subsequently denied him unemployment benefits, he pursued an age discrimination claim. 74 F.3d at 1463.

Similarly, consider the facts in *Cberg v. Allied Van Lines*, 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 511 U.S. 1108 (1994), where three employees chose to accept enhanced benefit packages including cash benefits of $15,871.51, $25,717.23 and $21,887.70 respectively, plus health benefits and pension contributions in exchange for a release of claims, expressly including ADEA claims. After all the benefits were paid, each sued Allied for age discrimination. 11 F.3d at 680-681.

These scenarios are neither rare nor isolated. In order to deal with this vexing problem, courts have invoked the tender back requirement. *Blistein*, 74 F.3d at 1466. As one recent district court put it in implementing a rule

requiring a tender back of severance benefits in all civil rights cases before it, "no federal district court can ignore the wave of dubious and potentially extortionate discrimination cases currently flooding the federal docket." The court attributed this problem to the fact that the current law enables such lawsuits to be brought at little or no risk to the plaintiffs. *Kristoferson v. Otis Spunkmeyer*, No. 96 Civ. 2521, slip op. at 8 (S.D.N.Y., June 4, 1997).

The same scenario is prevalent throughout the district courts. If the underlying decision here is overturned, employees will only be emboldened to take the money and then to take a free roll of the dice in hopes of an additional recovery.

V. FELA IS MATERIALLY DIFFERENT THAN THE ADEA.

Petitioner attempts to bolster her argument that invalid OWBPA releases are void rather than voidable based upon this Court's thirty year-old decision on a statute which simply cannot be considered analogous to the ADEA. Contrary to her arguments, petitioner's position is not supported by this Court's disposition in *Hogue v. Southern Railway Co.*, 390 U.S. 516 (1968), brought under the Federal Employers' Liability Act. *Hogue* is distinguishable for at least three reasons.

First, the respondent carrier in *Hogue* confessed error in this Court and declined to argue that the applicable law required a tender back of the consideration paid by the carrier for an employee's release. The issue, therefore, was not controverted in this Court, and the Court dealt with the case in a brief *per curiam* opinion entered without the benefit of adversary presentations.

Second, the Court's limited holding in *Hogue* focused squarely on the parties' mutual mistake regarding the extent of the employee's injuries. The employee injured his knee while working in the respondent carrier's shop. Liability under the FELA was not disputed. The parties believed, however, that the injury was not a particularly serious one, and the carrier therefore paid the employee $105 in exchange for a full release. Thereafter, it was determined that the employee was permanently injured, requiring two operations, one of which caused him to lose a kneecap. Under these circumstances, the Court held that the employee did not need to tender back the $105 in order to maintain an action for further compensation under the FELA. In the Court's words, "[w]e hold that a tender back is also not requisite when it is pleaded that the carrier and the employee entered into the release from mutual mistake as to the nature and extent of the employee's injuries." 390 U.S. at 517. No such mutual mistake of fact is at issue in this case.

Third, and perhaps most important, there is a substantial difference between the FELA and the ADEA, and that difference bears directly on *Hogue's* applicability to the present dispute. As the Fifth Circuit explained in *Wamsley*, the FELA was designed for purposes far different from those of the ADEA. The FELA was intended to provide liberal recovery for injured workers and thus to shift from the workers to the railroads the heavy cost of the severe injuries suffered in railroad operations. The statute deliberately stripped employers of their common law defenses and sought to encourage "'unburdened and expeditious recoveries'" by injured rail workers. 11 F.3d at 541, *quoting Smith v. Pinell*, 597 F.2d 994, 996 (5th Cir. 1979). By contrast, in the ADEA, Congress sought to

foster employment based on ability rather than age and to prohibit arbitrary age discrimination. Congress created a new right of action, but it did not express a desire actively to facilitate an ADEA claimant's recovery. *Wamsley*, 11 F.3d at 541. FELA is a statute under which liability is a given in most cases and typically the principal issue is the quantification of damages; but liability is almost always a critical issue under the ADEA, and the statute creates no presumption that a termination of employment was motivated by age discrimination. In the Fifth Circuit's words,

> the FELA has effectively rendered liability of the employer a given in the great majority of cases, leaving quantification of damages as the principal focus of settlement negotiations. No such inference of liability exists as to ADEA claims; mere termination of employment is not sufficient to establish liability. An ADEA claimant faces the burdensome task of proving that the termination of his employment was the result of unlawful age discrimination. Therefore, the elements to be considered in the settlement of an ADEA claim involve not only damages, but also the more critical issue of threshold liability.

Id. at 542. The *Wamsley* court therefore concluded that "the Seventh Circuit in *Oberg*[3] . . . improperly analogized the FELA to the ADEA and, thus, arrived at the erroneous conclusion that *Hogue* precludes a 'tender back' requirement in suits brought under the ADEA." *Id.* at 541, n.13.

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[3] *Oberg v. Allied Van Lines*, 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 511 U.S. 1108 (1994).

There is no basis, in record evidence or otherwise, for the assertion that petitioner or other employees would be unable to tender back their severance payments if they were required to do so as a condition of maintaining an ADEA action. Ability to tender back has never been put in issue here. Petitioner has not offered to return her enhanced benefits or sought a payment schedule that would enable her to do so over a period of time. Rather, she has simply sought to retain those benefits and nevertheless to sue Entergy under the ADEA.

Likewise, there is no basis for the argument that a tender back requirement would encourage employers to ignore the specific provisions of the OWBPA. Employers who seek releases in exchange for substantial cash payments would hardly be eager to see the prospect of litigation restored by a return of those payments. Rather, employers seek to obtain a lasting release and freedom from future litigation. They therefore have a strong incentive to ensure that releases are enforceable from the outset under the OWBPA.

In any event, the long established principle that a contract may be ratified by a party who retains the consideration was not overturned by the OWBPA. More importantly, finding ratification of releases covering civil rights claims is the best means to comply with the intent of Congress to promote private resolution of age discrimination claims. This encourages employers to offer such settlements due to a reasonable expectation that they are final or binding absent timely revocation.

CONCLUSION

For the foregoing reasons, the Illinois Chamber respectfully requests that the judgment of the United States Court of Appeals for the Fifth Circuit be affirmed.

Dated: August 20, 1997

Respectfully submitted,

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